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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1942

Nos. 387-388.

RECONSTRUCTION FINANCE CORPORATION,

*Petitioner,*

v.

BANKERS TRUST COMPANY,

*Trustee.*

**BRIEF OF RESPONDENT, BANKERS TRUST COMPANY,  
IN OPPOSITION TO PETITION OF RECONSTRUCTION  
FINANCE CORPORATION FOR WRITS OF CERTIORARI**

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under the Refunding Mortgage,  
dated August 23, 1901 of The  
Kansas City, Fort Scott & Mem-  
phis Railway Company.

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## TABLE OF CONTENTS

	PAGE
STATEMENT .....	1
STATUTE INVOLVED .....	4
THE ISSUE INVOLVED.....	5
POINT I—CERTIORARI SHOULD BE DENIED SINCE THE DECISION OF THE CIRCUIT COURT OF APPEALS WAS CORRECT .....	5
POINT II—CERTIORARI SHOULD BE DENIED SINCE ANY DECISION WHICH SHOULD HOLD, CONTRARY TO THE DECISION OF THE LOWER COURT, THAT SECTION 77(c) (12) WAS APPLICABLE TO THE CORPORATE TRUSTEE WOULD RENDER THAT STATUTE UNCONSTITUTIONAL.....	13
A. Subsection (c) (12) of Section 77, if held to be applicable to the services and expenses of the Corporate Trustee, would be an unconstitutional denial of its right to judicial review in violation of the Fifth Amendment of the Constitution of the United States.....	13
B. Subsection (c) (12) of Section 77, if held to be applicable to the services and expenses of the Corporate Trustee, would be an unconstitutional impairment of its property rights in violation of the Fifth Amendment of the Constitution of the United States.....	23
(a) Congress has no power under its bankruptcy powers to impair vested property rights .....	24
(b) Section 77 (c) (12), if applicable to the Corporate Trustee, would not be a mere suspension of or change in its remedy, but would be an impairment of its substantive right to a lien.....	25
C. Subsection (c) (12) of Section 77, if held to be applicable to the services and expenses of the Corporate Trustee, would be a violation of Section 1 of Article III of the Constitution of the United States .....	29
POINT III—NO CASE OF CONFLICT BETWEEN CIRCUIT COURTS OF APPEAL AT THE PRESENT TIME HAS BEEN MADE OUT .....	32
CONCLUSION .....	33

## INDEX OF AUTHORITIES

### Cases Cited

	PAGE
American Motor Products Corporation, In re, 98 Fed. (2d) 774 (C.C.A. 2, 1938).....	25
Bluefield Co. v. Public Service Commission, 262 U.S. 679 (1923) .....	23
Buildings Development Co., In re, 98 Fed. (2d) 841 (C.C.A. 7, 1938) .....	9
Central Kentucky Natural Gas Co. v. City of Mt. Sterling, 32 Fed. (2d) 338 (D.C.E.D. Ky., 1928).....	23
Chicago, G.W.R. Co., 29 Fed. Supp. 149 (D.C.N.D. Ill., 1939) .....	14
Chicago, Milwaukee & St. Paul Railway Company v. Minnesota, 134 U.S. 418 (1890).....	21
Chicago, M., St. P. & P. R. Co., 121 Fed. (2d) 371 (C.C.A. 7, 1941) .....	14, 16
Chicago & N. W. Ry. Co., 35 Fed. Supp. 239 (D.C.N.D. Ill., 1940) .....	14
Chicago & N. W. Ry. Co., 121 Fed. (2d) 791 (C.C.A. 7, 1941) .....	11
Chicago and North Western Railway Co. v. United States of America, et al. (Civil Action, No. 2810 D.C.N.D. Ill., May 29, 1941, not yet reported).....	14, 49
Continental Bank v. Rock Island Ry., 294 U.S. 648 (1935)....	24
Crowell v. Benson, 285 U.S. 22 (1932).....	22, 30
Denver Union Stock Yard Co. v. United States, 57 Fed. (2d) 735 (D.C.D. Colo., 1932).....	23
Erie Railroad Company Reorganization (Report of William L. West, Esq., Special Master, dated December 3, 1940)....	12
Fort Dodge, Des Moines & Southern Railroad Co., Matter of.....	12, 32
Guaranty Trust Co. v. Henwood, 86 Fed. (2d) 347 (C.C.A. 8, 1936), cert. den. 300 U.S. 661.....	25
Kansas City, Fort Scott & Memphis Railway, Matter of.....	32
Louisville Bank v. Radford, 295 U.S. 555 (1935).....	24
Murray v. Hoboken Land and Improvement Company, 18 How. 272 (1855).....	30

New York, New Haven & Hartford Railroad Company Reorganization, Report of Division 4 of Commission, 247 I.C.C. 677, at 696, August 27, 1941.....	28-29
Ohio Valley Co. v. Ben Avon Borough, 253 U.S. 287 (1920).....	22
Oshkosh Waterworks Co. v. Oshkosh, 187 U.S. 437 (1903).....	26
Osofsky, In re, 50 Fed. (2d) 925 (D.C.S.D. New York, 1931).....	27
Security-First National Bank v. Rindge Land & Navigation Co., 85 Fed. (2d) 557 (C.C.A. 9, 1936).....	24
Straus v. Baker Co., 87 Fed. (2d) 401 (C.C.A. 5, 1937).....	9
Tagg Bros. v. United States, 280 U.S. 420 (1930).....	23
F. S. v. New River Collieries, 262 U.S. 341 (1923).....	22
Utilities Power & Light Corporation, In re, 91 Fed. (2d) 598 (C.C.A. 7, 1937), cert. den. 302 U.S. 742.....	25
Western Distributing Co. v. Public Service Commission, 58 Fed. (2d) 289 (D.C.D. Kansas, 1931).....	23

### Statutes Cited

#### Bankruptcy Act:

Section 77 .....	1, 8-11, 16
Section 77B .....	9
Section 77(e)(7) .....	8
Section 77(e)(12) .....	1, 3-5, 7-16; 19-21, 23-32
Section 77(e)(2) .....	15, 16; 18, 30
Section 77(e)(3) .....	11

#### Constitution of the United States:

Article I, Section 10.....	26
Article III, Section 1.....	13, 29, 31
Fifth Amendment .....	13, 23, 24

Urgent Deficiencies Act.....	19
------------------------------	----

### Other Authorities

Willoughby on the Constitution of the United States, 2nd Ed., Vol. 2, p. 1223.....	26
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**BRIEF OF RESPONDENT, BANKERS TRUST COMPANY,  
IN OPPOSITION TO PETITION OF RECONSTRUCTION  
FINANCE CORPORATION FOR WRITS OF CERTIORARI**

**Statement**

1. Bankers Trust Company is Corporate Trustee (hereinafter called the "Corporate Trustee") under the Refunding Mortgage, dated August 23, 1901 (hereinafter called the "Mortgage"), of the Kansas City, Fort Scott & Memphis Railway Company, which as part of the St. Louis-San Francisco Railway Company system is in reorganization proceedings under Section 77 of the Bankruptcy Act, as amended, in the District Court of the United States for the Eastern District of Missouri.

2. On or about December 30, 1940, the District Court, by Order No. 242, directed that all petitions for compensation for services rendered or for expenses (including reasonable attorney's fees) to January 31, 1941, incurred either under clause (12) of subsection (c) of Section 77 of the Bankruptcy Act, or incurred otherwise than under that

clause, should be filed with that Court on or before February 15, 1941.

3. Paragraph two of Article Twenty-third of the Mortgage makes express provision for the compensation and expenses of the Trustees in the execution of the trusts created by the Mortgage as follows:

"The Trustees shall be entitled to reasonable compensation for all services rendered by them in the execution of the trusts hereby created, which compensation as well as all reasonable expenses necessarily incurred and actually disbursed hereunder, the Railway Company agrees to pay and hereby charges on the trust estate."

4. The Corporate Trustee now holds cash deposited with it subject to the terms of the Mortgage in the amount of \$72,020.55, of which \$29,402.58 represent accumulated proceeds of properties released from the lien of the Mortgage, and \$42,617.97 represent accumulated income received upon the collateral held subject to the terms of the Mortgage.

5. The Corporate Trustee rendered services in the execution of the trusts created by the Mortgage, which are set forth in detail in Petition No. 266 described in paragraph 7 below, for which it asked the sum of \$10,000 as reasonable compensation, together with the sum of \$767.88 for expenses incurred and actually disbursed.

6. The Corporate Trustee employed as legal counsel Messrs. White & Case, of New York City, and Messrs. Bryan, Williams, Cave & McPheeters, of St. Louis, Missouri, to advise it with respect to the performance of its duties under the Mortgage. For their legal services said firm of White & Case and said firm of Bryan, Williams, Cave & McPheeters rendered to the Corporate Trustee their bills in the respective amounts of \$10,000 and \$6,000 together with disbursements of \$24.28, which the Corporate Trustee



paid, pursuant to its powers under, and in accordance with the provisions of, the aforesaid Article Twenty-third of the Mortgage; such payments, however, having been made subject to their being finally determined by the District Court to be "reasonable expenses necessarily incurred and actually disbursed" under the Mortgage.

7. Thereafter and on or about February 15, 1941, the Corporate Trustee filed its petition (together with affidavits attached thereto) here involved (hereinafter called "Petition No. 266", Rec. p. 14), which set forth its services and expenses and those of its counsel above named, in the performance of the trusts under the Mortgage. In that Petition the Corporate Trustee prayed, among other things, that the District Court adjudicate that Section 77 (c) (12), quoted below, is not applicable to the Corporate Trustee, or if so applicable, that it is unconstitutional and void, and that the District Court adjudicate that there is due the Corporate Trustee the sums set forth in that Petition as its compensation and expenses (including the compensation and expenses paid by it to its counsel as aforesaid), for which it has a lien or charge under Article Twenty-third of the Mortgage.

8. In order, however, to protect the Corporate Trustee's rights and remedies in the event that it should be determined by the District Court that Section 77 (c) (12) was applicable to the Corporate Trustee, and, as so applicable, was constitutional, the Corporate Trustee, on or about February 15, 1941, filed (without prejudice to or waiver of its aforesaid Petition No. 266) a further petition (hereinafter referred to as "Petition No. 267", Rec. p. 83) to meet the provisions of Order No. 242 relating to petitions for compensation for services and expenses rendered and incurred under Section 77 (c) (12).

9. On June 30, 1941 the District Court entered its Order on Petition No. 266 (Rec. p. 87). Such order held

that Subsection (c) (12) was not applicable to the claim of the Corporate Trustee for compensation and expenses, allowed that claim in the amounts prayed for in that Petition and held that those amounts were a charge on the mortgage estate and upon the cash deposited under the Mortgage.

10. Upon appeal by Reconstruction Finance Corporation to the Circuit Court of Appeals, Eighth Circuit, that Court, on June 10, 1942, affirmed the judgment of the District Court (reported in 129 Fed. (2d) 122). The Petition for Writs of Certiorari, now before this Court, followed.

### **Statute Involved**

Subsection (c) (12) of Section 77 of the Bankruptcy Act reads as follows:

"(12) Within such maximum limits as are fixed by the Commission, the judge may make an allowance, to be paid out of the debtor's estate, for the actual and reasonable expenses (including reasonable attorney's fees) incurred in connection with the proceedings and plan by parties in interest and by reorganization managers and committees or other representatives of creditors and stockholders, and within such limits may make an allowance to be paid out of the debtor's estate for the actual and reasonable expenses incurred in connection with the proceedings and plan and reasonable compensation for services in connection therewith by trustees under indentures, depositaries and such assistants as the Commission with the approval of the judge may especially employ. Appeals from orders of the court fixing such allowances may be taken to the circuit court of appeals independently of other appeals in the proceeding and shall be heard summarily. The Commission shall, at such time or times as it may deem appropriate, after hearing, fix the maximum allowances which may be allowed by the court pay-

suant to the provisions of paragraph (12) of this subsection c and, after hearing, if the Commission shall deem it necessary, the maximum compensation which may be allowed by the court pursuant to the provisions of paragraph (2) of this subsection c."

### **The Issue Involved**

Whether the District Court has exclusive jurisdiction and sole power to determine and adjudicate the reasonable value of the services and expenses of the Corporate Trustee and of its attorneys and the amount and extent of its claim and lien therefor, or whether the Commission has exclusive jurisdiction under Subsection (c) (12) of Section 77 of the Bankruptcy Act to fix the maximum limits of such compensation and expenses. The determination of that issue depends, first, upon whether or not said Section 77 (c) (12) was intended to apply to the situation here presented by the Corporate Trustee, and, second, upon whether or not, if so intended, that statute would be constitutional.

### **POINT I**

**Certiorari should be denied since the decision of the Circuit Court of Appeals was correct.**

That decision directly upheld the contentions of the Corporate Trustee that it had a contract claim and prior lien upon the mortgaged property for its compensation and expenses and that the Bankruptcy Court had exclusive jurisdiction to allow that claim, without the intervention of the Interstate Commerce Commission under Section 77 (c) (12). The core of its decision is set forth in its opinion (Rec. p. 102) at pages 106 and 107, as follows:

P. 106: " \* \* \* Appellee's claim is based upon its contract, expressed in the refunding mortgage, and is for its services to the trust estate required

by that mortgage in fulfilling its duty and obligation to the bondholders secured by the mortgage.

Under Sec. 77 of the Bankruptcy Act the bankruptcy court acquired exclusive jurisdiction of all of the property of the debtor railroad wherever situated. But it took possession of the debtor's property subject to all valid claims against it. Appellee, as trustee under a mortgage conveying a large part of the debtor's estate as security for the payment of certain bonds of the debtor, intervened in the reorganization proceedings in order to protect the rights of the bondholders. In any plan of reorganization of the debtor finally adopted, these bondholders were entitled to fair and equitable treatment, and appellee was a proper party to represent them in the reorganization proceedings. By the terms of the trust indenture it was entitled to compensation for its services rendered in behalf of the bondholders. As a general rule the trustee is entitled to compensation out of the trust estate for the services rendered and expenses incurred in the protection of the trust. *Perry on Trusts and Trustees*, Vol. II, p. 1531; *Restatement, Law of Trusts*, Vol. I, Secs. 242, 244. *Schoenherr v. Van Meter*, 215 N.Y. 548, 109 N.E. 625; *Halkett v. Moore*, 282 Mass. 380, 185 N.E. 474. In the present case the trust estate was charged with a lien to secure the payment for the trustee's services and expenses properly incurred in the administration of the estate. As the bankruptcy court had possession of the trust estate as a part of the debtor's estate, it was necessary for the appellee to apply to that court for the allowance of its claim."

P. 107: "We think the claim of the appellee was within the jurisdiction of the court below to allow without the intervention of the Interstate Commerce Commission under Sec. 77 (c) (12)."

Although in the argument and briefs the separate issue had been raised as to whether the services in question were rendered "in connection with the proceedings and

plan" within the meaning of Section 77 (c) (12), the Circuit Court of Appeals held that that was not controlling on the question. It said in its opinion (129 Fed. (2d) at p. 125):

"Nor is the fact that the services of appellee may have been rendered and its expenses incurred in connection with the reorganization plan and proceedings controlling on the question here. In a literal sense they were because they were made necessary by the reorganization proceedings. \* \* \* But appellee was at all times acting primarily in the interest of the bondholders under the refunding mortgage. The fact that the services of appellee on behalf of the trust estate were also beneficial to the reorganization proceedings should add to rather than detract from, its right to compensation."

Futhermore, since the Circuit Court of Appeals held that Subsection (c) (12) and the jurisdiction of the Commission thereunder were not applicable to the Corporate Trustee, it was not necessary for it to pass upon any of the constitutional points which were there raised by the Corporate Trustee and are hereinafter set forth in this brief.

We submit that the foregoing decision is correct and that the decision of the District Court for the District of Connecticut (hereinafter referred to as the New Haven decision), referred to by Petitioner Reconstruction Finance Corporation at pages 9-10 of its Petition for Certiorari, which held that Subsection (c) (12) was applicable to a mortgage trustee with a claim and lien, is erroneous.

There can be no doubt that the Corporate Trustee has a contract claim and prior lien upon the mortgaged property for its reasonable compensation and expenses (including the compensation and expenses of its counsel) for all services rendered by it in the execution of the trusts thereby created. Even the New Haven decision fully upholds the validity and scope of that claim and lien. (See



that opinion at pages 16-18 of Appendix A attached to Petition for Certiorari.)

Passing for the moment the question of whether Subsection (c) (12) could constitutionally do so (considered hereinafter), the question is whether Subsection (c) (12) intended to take away the valuable and established incident of that contract claim and lien—its liquidation by the Court—and confer it upon the Commission. Since, as shown below in Points II-A and II-B, that result would constitute an unconstitutional denial of the right to judicial review and an unconstitutional impairment of vested property rights, we submit that Subsection (c) (12) should not be construed to have brought about that result.

That statute neither requires nor justifies any such conclusion. *Contrary to the conclusion in the New Haven decision (see pages 18-20 of Appendix A of Petition for Certiorari) there is not the slightest suggestion in the language or in the history of that enactment that it was intended to cover the liquidation or enforcement of a contract right and lien conferred by a mortgage for services and expenses of a mortgage trustee in the execution of the trusts created by the mortgage and to transfer the District Court's established and exclusive jurisdiction over the determination of such a right and lien to the Commission.* The amount, extent and priority of all secured claims and liens are intended under Section 77 to be adjudicated solely by the Bankruptcy Court and not by the Commission. Subsection (c) (7) provides expressly that the judge shall determine and fix a time within which claims of creditors may be filed and "the manner in which such claims may be filed or evidenced and allowed," and further provides for the division by the judge of creditors and stockholders "into classes according to the nature of their respective claims and interests." A mortgage trustee's secured claim and lien is just like any other lien and no different treatment is provided for it.



Furthermore, Subsection (c) (12) is in terms applicable only to an "allowance to be paid out of the debtor's estate." The Corporate Trustee is not applying here for an "allowance" out of the Debtor's estate under Subsection (c) (12); and its rights do not arise by reason of Section 77 (c) (12), but wholly independently thereof: It is seeking to enforce a contract right and a lien therefor conferred upon it both by the Mortgage and by the common law in 1901, when the Mortgage was executed, thirty-two years prior to the enactment of Section 77 itself.

The courts have several times recognized the distinction under Section 77B between compensation of a mortgage trustee, which is to be paid out of the mortgaged property pursuant to a contract claim and lien, and allowances which are to be paid out of the general estate.

Thus, in *Straus v. Baker Co.*, 87 Fed. (2d) 401 (C.C.A. 6, 1937), the court clearly distinguished between the right of a mortgage trustee to an allowance from the general estate and his right to compensation under the terms of the mortgage from a fund available for bondholders, stating, at page 408:

"The trustee Straus makes claim in the dual capacity of trustee for the bondholders under the mortgage, and as reorganization trustee. If, as the court found, he was active in the matter of the National Hotel cash plan, and those activities were in the interest of the bondholders, and contrary to the interest of the estate as a whole, the court correctly denied him compensation as reorganization trustee. But as trustee for the bondholders he was in any event entitled under the mortgage contract, to an allowance out of the fund."

The same distinction has been recognized in the case of *In re Buildings Development Co.*, 98 Fed. (2d) 841, 843-844 (C.C.A. 7, 1938), in which it was held that if a mortgage trustee does not "claim any priority . . . by reason of the lien provision in the trust indenture", and seeks only

an allowance from the general estate, the burden is upon such trustee to show the value of its services "to the debtor apart from the value to the bondholders".

The inclusion of the phrase "trustees under indentures" in Subsection (c) (12) does not require any other conclusion. It gives compensation to an indenture trustee, who might otherwise receive no compensation, such as a trustee under an unsecured issue or a trustee whose security has no value. But a trustee is not limited to the remedy of an allowance pursuant to Subsection (c) (12) and is not compelled to surrender its contract right to obtain its compensation from the liquidation of its lien by a court. The right conferred by that statute is not exclusive but a new remedy of which a trustee may take advantage if and to the extent that it falls within the requirements of the statute. There is not the slightest suggestion in the statute or in the statements made by members of Congress at the time of its enactment that it was intended to deprive a trustee of its pre-existing contract rights for services performed primarily for the trust estate and the bondholders, or to abrogate the legal incident of those rights, of liquidation by the Bankruptcy Court.

Nor is the fact that Section 77 alters the pre-existing technique for the enforcement of the secured claims of bondholders by means of a plan or reorganization, relied upon by the Court as an analogous situation in the New Haven decision (see pp. 18-19 of Appendix A of Petition for Certiorari), any indication ~~that~~ Section 77 intended to subject the secured claims of mortgage trustees for compensation and expenses to Subsection (c) (12) since the distinctions between the two situations are clear: (1) the bondholders have a lien the amount of which is definitely fixed by the terms of their mortgage contract while the amount of the lien of mortgage trustees has to be determined; (2) the bondholders have been given the additional

protection, under the statute, of a two-thirds vote of their particular class before they can be subjected to the plan, and of a clear-cut and established right of appeal while mortgage trustees with a lien have no such right to vote and no right of appeal.

The Commission has no jurisdiction unless clearly conferred upon it by Section 77. See *In re Chicago & N. W. Ry. Co.*, 121 Fed. (2d) 791 (C.C.A. 7, 1941), in which the court, in referring to Subsection (c) (12), said at page 800:

“ \* \* \* Moreover, the jurisdiction is in the Court, unless taken from it and placed in the I.C.C. by this subsection of the statute.”

The statute has not made that transfer of jurisdiction in respect to mortgage trustees holding liens for their compensation and expenses.

We submit from all of the foregoing that the decision of the Court below was correct in holding that Subsection (c) (12) does not apply to the claim and prior lien of the Corporate Trustee against the mortgage estate for its compensation and expenses; that Subsection (c) (12) has not taken away the exclusive power and duty of the District Court to adjudicate that claim and prior lien, and has not conferred that jurisdiction upon the Commission.

Those conclusions find additional support in the statute itself and in a further decision discussed below.

The statute itself makes express provision for the retention by the District Court of its jurisdiction to award compensation and expenses free of the jurisdiction of the Commission to fix maximum limits, in cases not covered by the statute, and it recognizes that the latter is not the exclusive source of compensation in a railroad reorganization. Thus Subsection (e) (3) of Section 77 provides that:

“ After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: \* \* \* (3) the plan provides for the payment of all costs of administration and all other

allowances made or to be made by the judge, except that allowances provided for in subsection (c) paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same."

In the Report dated December 3, 1940, of William L. West, Esq., Special Master appointed by the Court in the Erie Railroad Company Reorganization in the District Court of the United States for the Northern District of Ohio, to pass on the claim of the Chase National Bank, a secured noteholder, for legal expenses incurred by it in the enforcement and protection of the collateral securing the note, but not in connection with the proceedings and plan, it was argued against the allowance of that claim that the court had no power to determine the Bank's claim for legal expenses without first referring the matter to the Commission for the fixing of a maximum amount under Section 77 (c) (12). The Special Master rejected that contention completely, saying in his report:

"Furthermore, this claim involves the adjudication of a substantive right created by contract, for the Bank's right to have its reasonable expenses, including counsel fees, allowed as part of its secured claim arises by virtue of contract—i.e., the terms and provisions of the Debtor's note—and not by virtue of the provisions of the Bankruptcy Act relating to 'allowances'. Thus, apart from the terms of the Debtor's note, the Bank would not be entitled in this proceeding to the allowance of its claim for expenses.

Under the circumstances, this claim is not compensable as an 'allowance' under the Bankruptcy Act so as to require action by the Commission with regard to the fixing of a maximum amount."

It should be noted that in *Matter of the Fort Dodge, Des Moines & Southern Railroad Co.*, referred to at page 10 of the Petition for Certiorari, the amount involved was

so inconsequential in comparison with necessary traveling expenses, that counsel for the mortgage trustee, The New York Trust Company, did not appear and argue the case or file a brief.

Furthermore, as shown hereinafter under points II A, B and C, if Section 77 (c) (12) is held to be applicable to the Corporate Trustee having a claim secured by a lien, it would render that subsection of the statute invalid as an unconstitutional denial of its right to judicial review and as an unconstitutional impairment of its property rights, all in violation of the Fifth Amendment of the Constitution of the United States, and in violation of Section I of Article III thereof. The Court below was right in construing Section 77 (c) (12) as not applicable to the Corporate Trustee since a contrary construction would render it unconstitutional.

## POINT II

**Certiorari should be denied since any decision which should hold, contrary to the decision of the lower court, that Section 77 (c) (12) was applicable to the Corporate Trustee would render that statute unconstitutional.**

### A

**Subsection (c) (12) of Section 77, if held to be applicable to the services and expenses of the Corporate Trustee, would be an unconstitutional denial of its right to judicial review in violation of the Fifth Amendment of the Constitution of the United States.**

If Subsection (c) (12) were held to apply to compensation and expenses of a mortgage trustee with a contract claim and lien therefor against the mortgaged property, it would be an unconstitutional denial of the Corporate Trustee's right to judicial review.

It is our contention that if the maximum limits are to be fixed by the Commission under Subsection (c) (12), we



are constitutionally entitled to a review of such maxima by some court, either the District Court or an Appellate Court, with power to raise those maximum limits. We contend that no such right of review exists.

Although the District Court is given the authority under that statute to make an allowance which may be less than the maximum fixed by the Commission, it is clear from the following authorities that it has no power to pass upon whether the reasonable value of the services exceeds that maximum and may not raise that maximum.

Thus, in *In re Chicago, M., St. P. & P. R. Co.*, 121 Fed. (2d) 371 (C.C.A. 7, 1941), the court, after a study of Section 77 (c) (12) itself and the history of the Congressional Records leading to its passage, said at page 374:

"Our reading of the statute convinces us that Congress contemplated a plan (which it enacted) whereby the I.C.C., not the District Court, should fix the maximum allowances to attorneys, and within that allowance the court was to exercise its judgment.

"\* \* \* The court was ultimately to determine the amount of the fees, but its action was limited by the maximum fixed by the Commission."

In *In re Chicago & N. W. Ry. Co.*, 35 Fed. Supp. 230 (D.C.N.D. Ill., 1940), the court said at page 258:

"But whether the reasonable value of the services exceeds the maximum limits fixed by the Commission is, so far as this court is concerned, an academic question which this court has no power to determine and which it accordingly must decline to examine."

See to the same effect *In re Chicago, G.W.R. Co.*, 29 Fed. Supp. 149 (D.C.N.D. Ill., 1939) at page 162; *Chicago and North Western Railway Co. v. United States of America, et al.* (Civil Action No. 2810 D.C.N.D. Ill., May 29, 1941; not yet reported) portion quoted at p. 20 hereof.



Those decisions leave no doubt that the District Court has no jurisdiction whatsoever over the adequacy of the maximum and cannot take any effective action to have it raised.

The District Court in the New Haven decision held that if it concluded that the maximum was less than reasonable, it could refer it back to the Commission as part of its authority over the plan of reorganization under Subsection (e) (2) of Section 77, and that therefore the Corporate Trustee was not unconstitutionally deprived of its right to judicial review (see pp. 21 and 22 of Appendix A of the Petition for Certiorari). R.F.C. makes the same point in its Petition for Certiorari (see pp. 13-14).

Subsection (e) (2) provides as follows:

“ \* \* \* After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: \* \* \* (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, *are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge;* \* \* \* ” (Italics ours.)

We submit that those conclusions of the District Court are erroneous:

- (1) Plainly they are contrary to the foregoing cases.
- (2) They are contrary to the portion of Subsection (e) (2) above italicized which expressly reaffirms the requirement of Subsection (e) (12) that the allowance be within the maximum fixed by the Commission and expressly confines the District Judge's right of approval to an allowance within that maximum. It is obvious therefrom that the authority of the District Judge under Subsection (e)

(2) to pass upon the reasonableness of the allowances is circumscribed by the maximum over which he has no control, and that he has no authority whatsoever, as part of his jurisdiction over the plan or otherwise, to refer back to the Commission, at any stage of the proceedings, any finding of the Commission on maximum allowances, on the ground that it is too low.

(3) They are contrary to the intent of Congress in enacting Subsection (c) (12), which was to leave no discretion to the Judge at all as to the maximum, and to make the Commission the limiting factor on fees. This is shown clearly by the testimony of the Congressional hearings leading to its passage.

Thus, in the colloquy in which Commissioner Mahaffie of the Commission was testifying as to Section 77 (c) (12) at the hearings in April, 1935, before the House Judiciary Committee on the proposed amendments to Section 77 (quoted by the Court in *In re Chicago, M., St. P. & P. R. Co.*, 121 Fed. (2d) 371 *supra*, at p. 374), it was stated:

“Mr. Celler (Member of the House Judiciary Committee). It is true, though, that the court has very little to do under those circumstances.

Mr. Mahaffie. The court has to fix the actual fee and may have to hold a hearing on it.

Mr. Hancock (Member of the House Judiciary Committee). You anticipate that the maximum fee fixed will be the fee allowed and will also be the minimum fee, do you not? In other words, there will be no discretion left to the judge at all, as a matter of fact?

Mr. Mahaffie. I would not want to say that the court would not use some discretion under the statute. I anticipate that we will be the limiting factor on fees, however, if this proposed law is passed.

Mr. Celler. For practical purposes there would be no discretion left in the court except as to your maximum which would be quite low, I imagine, considering all the facts.

Mr. Mahaffie. I think that is substantially what has happened under section 72 as to the fixing of salaries; yes sir. We have fixed which we called a maximum and I think the courts have almost uniformly paid it."

From which the Circuit Court of Appeals in that case concluded as follows:

"Our reading of the statute convinces us that Congress contemplated a plan (which it enacted) whereby the L.C.C., not the District Court, should fix the maximum allowances to attorneys, and within that allowance the court was to exercise its judgment. . . .

To accomplish the result thus sought, the L.C.C. was empowered (and required) to fix the ceiling, — the maximum of fees and expenses for the various counsel representing the numerous claimants. The court was ultimately to determine the amount of the fees, but its action was limited by the maximum fixed by the Commission."

In the Report of the same hearings, the following occurred at page 85:

"Mr. Burgess (counsel for insurance companies). . . . I am not sure whether that maximum is appealable. Are you, Mr. Craven? That is, can the fixation of a maximum by the Commission be appealed under this act?

Mr. Craven (counsel for Commissioner Eastman in drafting the 1933 Act). I think not.

Mr. Burgess. You think not?

Mr. Craven. That is my recollection of it.

Mr. Celler (Member of the House Judiciary Committee). Even if the court would accept the maximum there would be no appeal from the court's ruling?

Mr. Burgess. I do not know of any appeal that you can take from the Commission's fixation of a maximum under this act.

Mr. Celler. That does not seem right.

Mr. Burgess. That is an appeal from the court's fixation, of course, but that would have to be within the maximum, so I do not know of any appeal.

Mr. Celler. That leaves the entire matter in the hands of the Interstate Commerce Commission, practically speaking.

Mr. Michener. Yes.

Mr. Burgess. Yes.

Mr. Celler. With no right of appeal at all if the maximum is accepted by the court?

Mr. Burgess. That is my understanding. If Mr. Craven had a different view, I should be glad to accept his view.

Mr. Craven. That is my understanding of it."

(4) The conclusions of the District Court in the New Haven decision as to its right of review of maximum allowances fixed by the Commission do not furnish a practical, workable solution and could not have represented the intent of Congress in enacting Subsection (e) (2). As stated by the District Court itself in its opinion "theoretically at least, the procedure may produce a deadlock between the Commission and the Judge which may ultimately block a reorganization." Congress certainly did not intend, we submit, to set up a procedure for the determination of allowances under which there was even a possibility of such a result. Nor is that possibility so remote. It is quite conceivable that courts with views divergent from the Commission's as to the measure of reasonable compensation might frequently find it impossible to come to an agreement with the Commission on the subject. The District Court finds no way out of such a dilemma except that it says "perhaps the disagreement can be solved by . . . an appeal from the Judge's order disapproving the reasonableness of a reconsidered maximum set by the Commission."

As shown above, the Judge has no authority under Subsection (c) (12) to make such an order and as shown below, the authority of the Circuit Court of Appeals under Subsection (c) (12) to pass upon maxima is no greater than that of the District Judge.

The right of appeal to the Circuit Court of Appeals is only from "orders of the Court fixing such allowances." That subsection furnishes no authority whatever for an appeal from the maximum fixed by the Commission, and that authority is not contained anywhere in the statute. On an appeal from the District Court's order, the Circuit Court of Appeals cannot review the reasonableness of that maximum, since the District Court in making the order appealed from cannot pass upon the maximum. As shown by all of the foregoing, both the District Court in making its order and the Circuit Court of Appeals in reviewing it are confined to a determination of reasonableness within the maximum fixed by the Commission.

There is nothing whatever in the statute which authorizes the Circuit Court of Appeals to remand any finding on maximum allowances to the Commission at any stage of the proceedings. Even if that were possible, the Court would be powerless to fix the sum to be awarded and the Corporate Trustee's only remedy would consist of a succession of expensive appeals to the Circuit Court of Appeals from successive inadequate maxima fixed by the Commission.

There is no right of appeal under the Urgent Deficiencies Act from the maximum limits fixed by the Commission. See *Chicago and North Western Railway Company v. United States of America, and Interstate Commerce Commission* (Civil Action No. 2810 D.C.N.D. Ill., May 29, 1941), which arose on an appeal to a statutory three judge court under the Urgent Deficiencies Act, for an injunction setting aside an order of the Commission which refused to make an allowance for the costs of an appeal by the debtor therein



from the approval of the plan of reorganization. There the court in holding that it did not have jurisdiction of the appeal said in referring to Section 77 (c) (12):

"This section provides a complete scheme for the handling of expenses of reorganization—first, the I.C.C. passes upon the maximum amount which may be devoted to a specific expense, then the district court further checks such allocation, *and is granted power only to diminish the same, and then the aggrieved party may challenge the District Court's determination* by immediate and summary appeal to the Circuit Court of Appeals." (Italics ours.)

Nor is the remedy of mandamus available to determine whether the Commission has made a reasonable allowance since it is axiomatic that mandamus will not lie to control or review the exercise of discretion (in the absence of patent abuse).

In view of all of the foregoing, we submit that the District Court's conclusion in the New Haven decision (see p. 23 of Appendix A to Petition for Certiorari), that the Corporate Trustee's constitutional right to judicial review has been safeguarded, is clearly unsound.

There is a fundamental distinction between the power of the District and Circuit Courts over a plan of reorganization, and their power to review maximum limits of allowances. Under the former the courts are not bound by the plan proposed by the Commission. If one plan or fifty plans submitted by the Commission appear to the courts to be unreasonable, one and all can be rejected by the courts. Under Subsection (c) (12), on the contrary, if the Commission should allow a maximum of \$50 for services which the Court considers to be worth \$10,000, the Court can do nothing to raise the maximum or to compel the Commission to do so.

Since Subsection (c) (12) makes no provision for any judicial review upward from the maximum of the Com-



mission, which is binding and conclusive, it is unconstitutional if held to be applicable to the determination of the contract right and lien of the Corporate Trustee for compensation and expenses.

The Court below was right in construing Section 77 (12) as not applicable to the Corporate Trustee since a contrary construction would render it unconstitutional.

*Since a constitutional right of the Corporate Trustee is involved, the statute, if held to be applicable to it, is unconstitutional in not providing for a complete judicial review as to both fact and law. In any event, it is unconstitutional in not permitting revision upwards by judicial review, of the maximum fixed by the Commission.*

It is well established that legislation, whether of Congress or of the States, cannot constitutionally make the determination of an administrative body binding and conclusive in a matter involving a constitutional question and take away the right to the independent judgment of a court as to both facts and law in the matter. In the case at bar the constitutional matter involved is the Corporate Trustee's contract right and lien for reasonable compensation and expenses (to be determined according to the recognized standards set forth in Point II, B (b)), and to be protected against an allowance inadequate and unrelated to real value, which would amount to a deprivation of property without due process of law.

In *Chicago, Milwaukee & St. Paul Railway Company v. Minnesota*, 134 U. S. 418 (1890), the court held a state statute unconstitutional which made the rates of charges for transportation fixed by a railroad commission conclusive and denied a judicial inquiry as to the reasonableness of those rates, saying at pages 457, 458:

"It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judi-

cially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice.

\* \* \* \*

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the constitution of the United States \* \* \*."

In *U. S. v. New River Collieries*, 262 U. S. 341 (1923), the Court said at pages 343-344:

"The ascertainment of compensation is a judicial function, and no power exists in any other department of the Government to declare what the compensation shall be or to prescribe any binding rule in that regard."

In the leading case of *Ohio Valley Co. v. Ben Avon Borough*, 253 U. S. 287 (1920), an order of a commission fixing maximum rates for a water company was held unconstitutional on the ground that it violated due process of law as depriving the water company of judicial review.

See also to the same effect:

*Crowell v. Benson*, 285 U. S. 22 (1932) (which arose under a Federal statute), at p. 60;

*Bluefield Co. v. Public Service Commission*, 262 U. S. 679 (1923);

*Central-Kentucky Natural Gas Co. v. City of Mt. Sterling*, 32 Fed. (2d) 338 (D.C. E.D. Ky., 1928), at p. 341;

*Western Distributing Co. v. Public Service Commission*, 58 Fed. (2d) 239 (D.C.D. Kansas, 1931) at p. 241;

*Denver Union Stock Yard Co. v. United States*, 57 Fed. (2d) 735 (D.C.D. Colo., 1932) at p. 739.

Furthermore, it is well settled that a statute under which an administrative body acts must always provide for a right of judicial review to determine whether the decision of the administrative body was contrary to law or to the evidence or without evidence to support it.

See:

*Denver Union Stock Yard Co. v. United States*, 57 Fed. (2d) 735 (D.C.D. Colo., 1932);

*Tagg Bros. v. United States*, 280 U. S. 420 (1930), at p. 444.

## B

Subsection (c) (12) of Section 77, if held to be applicable to the services and expenses of the Corporate Trustee, would be an unconstitutional impairment of its property rights in violation of the Fifth Amendment of the Constitution of the United States.

If Subsection (c) (12) were held to apply to compensation and expenses of a mortgage trustee with a contract claim and lien therefor against the mortgaged property, it would be an unconstitutional impairment of the Corporate Trustee's property rights.

**(a) Congress has no power under its bankruptcy powers to impair vested property rights.**

As shown under Point I *supra*, the Corporate Trustee has a contract right to reasonable compensation and expenses and has a prior lien or charge therefor upon the mortgaged property, which became vested long prior to the enactment of Section 77 (c) (12), both under the Mortgage and under the common law. It is our contention that the Corporate Trustee has the right to have the amount, validity and priority of that contract right and lien determined exclusively by the Bankruptcy Court and charged by it against the mortgaged property, including the cash deposited under the Mortgage, and that if Congress has attempted to substitute therefor the right to have the Commission determine the maximum amount of that right and lien under Section 77 (c) (12); that statute if applied to the Corporate Trustee is an unconstitutional impairment of its vested property rights in violation of the Fifth Amendment to the Constitution.

It is well settled that the bankruptcy power of Congress is subject to the Fifth Amendment and that, accordingly, Congress does not have the power to impair vested rights or liens by bankruptcy legislation.

See:

*Louisville Bank v. Radford*, 295 U. S. 555 (1935)  
at pp. 589, 594, 601-602;

*Continental Bank v. Rock Island Ry.*, 294 U. S. 648  
(1935) at pp. 676-677, 681.

In *Security-First National Bank v. Rindge Land & Navigation Co.*, 85 Fed. (2d) 557 (C.C.A. 9, 1936), the court said at page 561:

"The right to retain a lien until the debt secured thereby is paid is a substantive property right which may not be taken from the creditor consistently with

the Fifth and Fourteenth Amendments to the Constitution. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 594."

See to the same effect:

*In re American Motor Products Corporation*, 98 Fed. (2d) 774 (C.C.A. 2, 1938) at p. 775;

*In re Utilities Power & Light Corporation*, 91 Fed. (2d) 598 (C.C.A. 7, 1937) at pp. 600-601; cert. denied 302 U. S. 742;

*Guaranty Trust Co. v. Henwood*, 86 Fed. (2d) 347 (C.C.A. 8, 1936) at p. 352; cert. denied 300 U. S. 661.

(b) Section 77(c) (12), if applicable to the Corporate Trustee, would not be a mere suspension of or change in its remedy, but would be an impairment of its substantive right to a lien.

The District Court in the New Haven decision said in its opinion (see pp. 20 and 24 of Appendix A to Petition for Certiorari):

"The petitioners' liens are not impaired. Like the liens of all the mortgagees and pledgees in these proceedings, the remedy only is suspended. If these proceedings shall be dismissed, the lien forthwith becomes enforceable with all its pristine vigor. Such a suspension of the remedy is not inconsistent with the Constitution."

"Nor can the bankruptcy court in these proceedings enforce the petitioners' liens. For the liens are suspended during these proceedings; they may be enforced only if these proceedings are dismissed."

We submit that those conclusions are erroneous. This is not a case of a mere suspension of a remedy, but of an impairment of a substantive right. The distinction between the two is perfectly clear.



The test in the analogous question as to whether a particular state statute has impaired the obligation of contracts in violation of Article I, Section 10, of the Constitution is stated in *Oshkosh Waterworks Co. v. Oshkosh*, 187 U. S. 437 (1903), as follows at page 439:

"But it is equally well settled that the Legislature may modify or change existing remedies or prescribe new modes of procedure, without impairing the obligation of contracts, *provided a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract.*" (Italics ours).

And in *Willoughby on the Constitution of the United States*, 2nd Ed., Vol. 2, it is stated as follows at page 1223:

"It is apparent, then, that it lies within the province of the court in each individual case to determine whether the legislative alteration of a remedial right with reference to a contract earlier entered into is of such a drastic character as to cause it to diminish the substantive rights under that contract, and thus, in effect, to impair its obligation."

The remedy of an "allowance to be paid out of the debtor's estate" provided for in Section 77 (c) (12) under which the Commission would have sole power to fix the maximum amount of the Corporate Trustee's contract claim and lien and which would be subject to the other conditions and restrictions of that provision, set forth at pages 27 and 28 hereinafter, is not an effective equivalent for the contractual right to reasonable compensation and expenses secured by a lien, the amount of which is to be adjudicated by the Court. The difference between the two is so fundamental as substantially to lessen the value of that contract and to impair the Corporate Trustee's substantive rights to a lien thereunder. A comparison between them will dispel any doubt on that point.



Under the provisions of the Mortgage and under the common law: (1) the Corporate Trustee has a contract right to reasonable compensation and expenses (including counsel's compensation and expenses), for all services rendered by it in the execution of the trust, secured by a lien or charge upon the mortgaged property (all as conceded by the District Court in the New Haven decision); (2) it is entitled under the laws in force at the time the Mortgage contract was entered into in 1901 and which became a part of the obligation, to have the amount and extent of that claim and lien adjudicated by a court, which will feel bound to exercise its independent judgment, uninfluenced by any prior determination of an administrative agency, in measuring the value of the services of the Corporate Trustee and of its attorneys by standards which have long been properly employed by the courts in fixing compensation, which include the difficulty and intricacy of the matters presented, the amount involved, the results attained, the time spent and the experience and qualifications of the persons properly performing such services (see *In re Osafsky*, 50 Fed. (2d) 925, D.C.S.D. New York, 1931 at p. 927); (3) it is entitled to compensation and expenses for all services performed by it in the execution of the trusts created by the Mortgage, irrespective of whether they were directly and materially beneficial to the estate as a whole and contributed directly and materially to the accomplishment of the reorganization; and (4) it is entitled to a right of review by a court which has power to raise, as well as lower, the maximum limits fixed by the Commission.

Compared with the right to compensation and expenses to which the Corporate Trustee is entitled under its Mortgage contract, as well as under the common law, the right under Section 77 (c) (12) (if applicable, which we deny) is not an effective equivalent, but an illusory substitute.

Thus, under that statute: (1) the Corporate Trustee is deprived of its absolute contract right to compensation, secured by a prior lien, and is given merely permission to ask the Commission for a discretionary allowance; (2) it is deprived of its right to have the Court exercise its independent judgment uninfluenced by any prior determination of an administrative agency, in passing upon the amount of its claim according to definite standards and precedents which have been evolved and applied by the courts in fixing fair compensation for the last 150 years, and it is subjected to the jurisdiction of the Commission to fix any maximum limits it pleases in its uncontrolled discretion and based upon standards not relevant in determining the lien claim of the Corporate Trustee, such as the exigencies of the plan of reorganization, the need of the Debtor for adequate cash working capital and the total of the allowances applied for; (3) its allowance is limited by the extent to which its services have directly and materially benefited the estate as a whole (as distinguished from those services which have benefited only its bondholders) or the plan of reorganization, since those are the standards which the Commission applies in fixing maxima under Subsection (c) (12); and it is deprived of its right to receive reasonable compensation for its services in the execution of the trusts created by the Mortgage that did not directly and materially benefit the estate as a whole or aid in the consummation of the reorganization; and (4) it is not entitled to any right of review by a court which has the power to raise, as well as lower, the maximum limits fixed by the Commission, to which it is constitutionally entitled.

In view of the foregoing it is difficult to find any basis for the conclusion of the District Court in the New Haven decision (see page 19 of Appendix A to Petition for Certiorari) that the same standard of liquidation prevails under Section 77 (c) (12) as under the Mortgage contract.

In the compensation report of Division 4 of the Commission in the New York, New Haven and Hartford Rail-

road Company Reorganization, 247 I.C.C. 677 (August 27, 1941), it was stated at page 696:

"Finally, from all of the foregoing, we believe it is clear that we are not fixing the maximum limits of allowances for services and expenses of mortgage trustees on the basis of the indenture contracts."

The substitution, therefore, of Section 77 (c) (12) for the rights of the Corporate Trustee under its Mortgage contract and under the common law is not a mere change of remedy, but a change of substantive right. That result is not changed one iota by the District Court's reminder that if the reorganization proceedings are dismissed, the Corporate Trustee's lien becomes enforceable.

### C

**Subsection (c) (12) of Section 77, if held to be applicable to the services and expenses of the Corporate Trustee, would be a violation of Section I of Article III of the Constitution of the United States.**

In the event that Subsection (c) (12) is held to apply to compensation and expense of a mortgage trustee with a contract claim and lien therefor against the mortgaged property, it would be a violation of Section I of Article III of the United States Constitution.

Under Section I of Article III of the Constitution; the judicial power of the United States is vested exclusively in the Courts. Thus in matters involving private right the judicial power may not be delegated to bodies other than constitutional courts.

The adjudication of the amount of the contract claim and lien of a mortgage trustee for its compensation and expenses is clearly a matter of private right and a judicial function which can be performed only by the courts. Functions traditionally performed only by courts are deemed

within the judicial power of the United States. *Crowell v. Benson*, 285 U.S. 22 (1932) at page 31; *Murray v. Hoboken Land and Improvement Company*, 18 How. 272 (1855).

Furthermore, no standards whatsoever are set up in Section 77 (c) (12) or Section 77 (e) (2) for the determination of such maximum by the Commission. No standards are prescribed in either Subsection for fixing reasonable value. Subsection (c) (12) has delegated to the Commission the power to determine maxima in its uncontrolled discretion. There is nothing in it to prevent the Commission from fixing a maximum based entirely upon the cash position of the Debtor or the total allowances applied for or other considerations not relevant in determining the lien claim of the Corporate Trustee and from arbitrarily cutting compensation requested by the latter to fit within that maximum. But by the express terms of the Mortgage, the Corporate Trustee is entitled to reasonable compensation.

There is a clear distinction between mortgage trustees and other parties mentioned in Subsection (c) (12), such as a committee or counsel for the debtor's trustee. The former accepted their duties and responsibilities and obtained their contractual claim to compensation prior to the enactment of the statute and cannot voluntarily limit these duties and responsibilities. This is clearly set forth by the District Court in the New Haven Decision (see pp. 16-17 of Appendix A to Petition for Certiorari) as follows:

"I cannot accept the view that the petitioners were acting as mere volunteers in the premises.

I think no one will dispute that the petitioners would have been remiss in their proper discharge of their trusts if in an equity receivership they had left their cestuis without representation or after default had failed to take appropriate action for their protection. . . . I find nothing in Section 77 which exonerates mortgage trustees from their equitable

obligation to take action appropriate to the same objective. Such a view, indeed, seems repugnant to Congressional policy as declared in the Trust Indenture Act of 1939. See 15 U.S.C.A. 77bbb and 77ooo(c)."

Parties other than mortgage trustees are volunteers in the proceedings, not under any pre-existing duties and responsibilities and may limit the extent and nature of their services or may be willing to take their chances on court allowances within a maximum to be fixed by the Commission. They have no contract claim and lien for their compensation. The amounts of their allowances and the method of determining the same are naturally governed by the statute creating their rights, thereto.

Since Section 77 (c)<sup>1</sup> (12), if applicable, gives a body other than a constitutional court power to make a final decision as to maximum allowances for services and expenses covered by a preexisting contract claim secured by a lien, as to which there is no right of court review and no prescribed standards, it is contrary to Section I of Article III of the Constitution.



## POINT III

**No case of conflict between Circuit Courts of Appeal at the present time has been made out.**

There is no conflict now existing between decisions of Circuit Courts of Appeal. Both the District Court and the Circuit Court of Appeals, 8th Circuit, upheld the inapplicability of Section 77 (c) (12) and the exclusive jurisdiction of the Bankruptcy Court, in the Kansas City, Fort Scott & Memphis Railway Company case. The only decisions to the contrary are the decision of the District Court in the New Haven matter and the decision (for what it is worth), of the District Court in the Fort Dodge, Des Moines & Southern Railroad Co. matter. Thus there is at the present time a conflict of decisions only between decisions of District Courts and the decision of the Circuit Court of Appeals, 8th Circuit.

In the New Haven case, a notice of appeal has been filed in the District Court by the Corporate Trustee, and, in addition, it has filed with the Circuit Court of Appeals, 2nd Circuit, a petition seeking leave to appeal. That petition will come on for hearing on October 5, 1942. Not yet, therefore, has the Circuit Court of Appeals, 2nd Circuit, reviewed the decision of the District Court in the New Haven case. Not until that Circuit Court of Appeals has upheld such decision, or some other Circuit Court of Appeals has rendered a decision which is contrary to the decision of the Circuit Court of Appeals in the Kansas City, Fort Scott & Memphis Railway Company case, will there be a conflict of decisions among Circuit Courts of Appeal.

If that Circuit Court of Appeals agrees with the Circuit Court of Appeals in the Kansas City, Fort Scott & Memphis Railway Company case, this Court might not deem it necessary to decide the question. If, however, there is a conflict between them, there will then be an opportunity for this Court to decide whether to grant certiorari.

**CONCLUSION**

**The Petition for Writs of Certiorari should be denied.**

Dated: September 29, 1942

Respectfully submitted,

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WHITE & CASE,  
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pany, as Corporate Trustee  
under the Refunding Mortgage,  
dated August 23, 1901 of The  
Kansas City, Fort Scott & Mem-  
phis Railway Company.

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